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Legal Protection of Child Trafficking in the Provision of Compensation and Restitution Rights in Indonesia

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Abstract

This study aims to determine the legal protection of victims of child trafficking in the provision of compensation and restitution rights. Legal protection for victims one of them provides the right of compensation and restitution as a form of distribution of justice for the victims. The existence of the Law relating to the provision of compensation and restitution to the victims has provided the rule for legal protection, but the implementation of compensation and restitution to victims of trafficking in child trafficking is still not widely applied and felt. This research is a normative legal research or legal literature research that is prescriptive or applied and obtained through study. Based on the result of the research, it can be concluded that there are some problems arising in the implementation of mechanism to get the right of compensation and restitution for victims of child trafficking crime. These issues are not only about the rules, but also of institutions authorized to assist victims of trafficking in children in obtaining their right of compensation and restitution.

Keywords: Legal Protection; Victims of Child Trafficking; Compensation and Restitution

Introduction

Human trafficking is used to refer to human trafficking action. Term *human trafficking* is new in Indonesia. Human trafficking phenomenon has been existent since 1949, since the ratification of Convention on Trafficking in person. Trafficking in person can be defined as recruitment, transportation, transfer, hiding or acceptance of an individual, with threat or violence use or other pressure forms, kidnapping, falsification, fraud or deception, or power abuse or vulnerable position, or wage revenue/ payment or benefit thereby obtaining agreement from the one controlling the individual to be exploited, minimally including exploitation through prostitution or other sexual exploitation form, forced working or service, slavery or similar practices, illegal adoption or body organ taking.¹

In relation to the victim of human trafficking crime, most of which are children and women constituting next generation, potential and strategic groups to the nation's sustainability, serious attention

¹ Republic of Indonesia. *Penghapusan Perdagangan orang* (Trafficking in Persons) *di Indonesia*. Jakarta: Kementerian Koordinasi Bidang Kesejahteraan Rakyat (2004-2005), p. 2.

should be paid to them. Government should focus seriously on the attempt of eradicating this human trafficking crime. The attempt can be accomplished through preventive, repressive, and responsive law enforcement, and through recovering or protecting children becoming the victim of child trafficking after the completion of trial process aiming to recover the children's future.

Child protection is any attempt taken to create a condition for all children to enable them to implement their rights and obligations for the sake of their reasonable development and growth, whether physically, mentally, and socially.

There are several protection forms: restitution, compensation, rehabilitation, and reintegration. Basically, victim protection is intended to deal with the effect felt by the victim as the result of crime committed against the corresponding one. Human rights of victim or those trafficked should be the focus of any attempt to prevent and eradicate human trafficking and to protect, to help, and to give compensation.

A form of compensation to the victim of crime is restitution. Restitution, according to *restitutio in integrum* principle, is an attempt to recover the victim of crime to its previous condition before the crime occurs although it is realized that it is impossible for the victim to revert to original condition. This principle confirms that the form of victim recovery should be as complete as possible and involves various aspects resulting from crime. Through restitution, the victim will be recovered for their freedom, legal rights, social status, family life and citizenship, residence, job, and asset. In practice, in most states this restitution concept is developed and given to the victim of crime for their sorrow. In this concept, victim and family should get fair and appropriate compensation from the guilty person or the responsible third party. This compensation will involve the recovery of property or payment for damage or loss suffered from, the reimbursement of cost incurred by action resulting in a victim, service providing, and recovery rights.²

Compensation is given by the state because the perpetrator is incapable of giving it for which he/she should be responsible completely. Restitution is compensation given to victim or family by perpetrator or third party, in the form of returning the property, paying compensation for loss or sorrow, or reimbursing for the cost of certain action.³ The provision of special law has given foundation for victim protection including in the form of prosecution for compensation, as included into Law Number 26 of 2000 about Human Rights giving foundation for the victim of severe human rights violation to get compensation and restitution as mentioned in article 34 clause (1) stating that "Every victim of severe human rights violation and or its beneficiaries will get compensation, restitution and rehabilitation".

Nevertheless, in fact there are many problems occurring in the implementation of compensation stipulation for the victim of children trafficking crime, governed in KUHAP (Code of Criminal Procedure) and Witness and Victim Protection Law. In reality, compensation and restitution giving as the form of law protection to the victim of children trafficking crime still have some weaknesses and have not been able to apply and have not been acceptable to the victim. Many victims have not gotten their compensation and restitution rights to recover their condition from either physical or psychical loss. This article aims to study some problems arising in relation the provision of compensation including both compensation and restitution to the victim of children trafficking crime and to analyze the formulation of compensation and restitution stipulation as an ideal law protection effort in order to meet the victim's feeling of justice in the future. Considering the phenomenon aforementioned, the author is interested in conducting a research included into a study on what the appropriate law protection is to the victim of

² Supriyadi Widodo Eddyono, *et. al*, "Masukan Terhadap Perubahan UU No. 13 Tahun 2006 tentang Perlindungan Saksi dan Korban", (Jakarta: Koalisi Perlindungan Saksi dan Korban), p. 16.

³ R. V. Alvianto. *Mekanisme Pemberian Kompensasi dan Restitusi Bagi Korban Tindak Pidana, Lex Crimen*, Vol. I/Jan-Mrt/2012, Fakultas Hukum Sam Ratulangi, Manado.

children trafficking crime and to formulate the ideal form compensation and restitution in order to meet the victim's feeling of justice.

Methodology

This study was a normative or library law research that is prescriptive or applied in nature. The type of data used was secondary data source, deriving from library study and relevant to the problems studied including legislation, official documents, books, and scientific journal relevant to the topic of study.

Results

Law Protection for Children as Victim of Human Trafficking

The protection of children becoming the victims of human trafficking crime is inseparable from Human Rights material as governed in both law and ordinances and RI's constitution. TAP MPR (House of Representatives' Decree) Number XVII/MPR/1998, among others, states that Definition of Human Rights to Indonesians is as follows:⁴ "Basic rights are fundamental rights of all human beings without discrimination. Recalling that basic rights are gift from God, the definition of Human Rights is the rights as gift from God inherent to human beings, omnipotent, universal and everlasting, and related to human's dignity and prestige".

Human trafficking crime is of course the one highly infringing human rights that can be seen not only from its action form but also the consequence incurred to the victim of human trafficking, particularly children. Guaranty of protection for children becoming the victim of child trafficking has been generally mandated in Article 28 b clause (2) of Republic of Indonesia's 1945 Constitution, stating that "Children's Right to life sustainability, growth, and development, and to protection from violence and discrimination".

In addition to Republic of Indonesia's 1945 Constitution, article 59 of Law Number 35 of 2014 about the Amendment to Law Number 23 of 2002 about Child Protection confirms that Government, Local Government and other state institutions are obliged and responsible for giving special protection to child exploited economically and/or sexually and victim of kidnapping and trafficking. The form of protection given is governed in Article 68 of Law Number 35 of 2014 about the Amendment to Law Number 23 of 2002 about Child Protection mentioning that "Special protection⁵ for children becoming the victim of kidnapping and trafficking is conducted through supervising, protecting, preventing, treating, and rehabilitating attempts".

Law protection attempt for children becoming the victim of human trafficking crime is intended not only to children but also to be an attempt of preventing human trafficking crime from occurring with children being its victim. Law Number 35 of 2014 about Amendment to Law of 23 of 2002 about Child Protection does not mention specifically the detail elaboration of protection for child becoming the victim

⁴ Majelis Pemusyawaratan Rakyat Republik Indonesia, *Putusan Majelis Permusyawaratan Rakyat Republik Indonesia: Sidang Tahunan Majelis Pemusyawaratan Rakyat Republik Indonesia 7-8 Agustus 2000*. Sekretariat Jenderal MPR-RI: Jakarta. 2000, p. 90, Bab I, Subbab D. *Cited from: SatyaArinanto, Hak Asasi Manusia dalam Transisi Politik di Indonesia*. (Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2011). p. 52.

⁵ Definition of Special Protection in Article 1 clause 15 of Law 23 of 2002 about Child Protection is that "Special protection is the one given to child in emergency situation, child facing the law, child coming from minority and isolated, exploited economically and/or sexually, child trafficked, child becoming the victim of drug, alcohol, psychotropic, and other addictive substance abuses, child becoming the victim of kidnapping, trafficking, physical and/or mental violence, disabled child, and child becoming the victim of mistreatment and negligence".

of kidnapping and human trafficking. Only article 78 mentions that anybody knowing and deliberately allowing children to be exploited economically and/or sexually, and trafficked will be imposed with criminal sanction.

Article 71 D mentions that child exploited economically and/or sexually, and trafficked is entitled to file prosecution to the Court for the right to restitution for which the perpetrator of crime is responsible. This article 71 D is related to the right the child as the victim after the trial process. Law Number 21 of 2007 about Eradication of Human Trafficking Crime focuses only on preventing and handling human trafficking crime. For child being the victim of human trafficking crime, this law governs only what has been governed in 9 articles: Articles 1 clause (5), 5, 6, 17, 38, 39, and 40.

Law protection attempt for children being the victim of human trafficking in both Law Number 21 of 2007 about Eradication of Human Trafficking Crime and Law Number 35 of 2014 about the Amendment to Law Number 23 of 2002 about Child Protection is divided into 3 stages: protection during crime process, stage of trial the criminal, and stage after the court's verdict. The three stages are explained as follows:

- 1) Protection stage during human trafficking crime involves condemnation threat against anybody knowing and deliberately allowing children to be exploited economically and/or sexually, and trafficked (Article 78 of RI's Law No.35 of 2014).
- 2) Protection during the process of trial the perpetrator of human trafficking crime includes (RI's Law No.21 of 2017):
 - a. Investigation, prosecution, and examination of child witness and/ or victim are conducted in court session by considering the best interest of child without wearing toga or service costume.
 - b. Human trafficking crime trial for examining child witness and/or victim is conducted in closed session.
 - c. Investigation of child witness and/ or victim should be accompanied with parents, guardian, caretaker, advocate, or other facilitators.
 - d. Investigation of child witness and/ or victim as mentioned in clause (1) is implemented without the presence of defendant.
 - e. Investigation of child witness and/ or victim, based on the judge's approval, can be done out of the court session by means of recording made by the authorized official.
- 3) Post-trial stage is to give the right to file prosecution to the court for restitution right⁶ for which the perpetrator of crime is responsible (Article 71 D of Law No.35 of 2014 Jo Law No. 23 of 2002 and Articles 48-50 of Law No.21 of 2007).

From these three stages, the legal attempt of protecting child as the victim of human trafficking crime post-court verdict against the perpetrator is limited to giving restitution right that should be filed first by the victim and/or its beneficiaries. This compensation or restitution, according to the enacted law, can be prosecuted through civil prosecution by means of filing the annexation of restitution prosecution case based on Article 99 of KUHAP. In such case annexation, victim can only demand for compensation or fee or real cost it has spent as the result of the defendant's crime (material loss). Another possibility is

⁶Article 1 clause (13) of Law Number 21 of 2007 defines restitution as "compensation payment imposed to the perpetrator based on the court's verdict having fixed power over material and immaterial losses suffered from by victim or its beneficiaries".

to file the demand for restitution to civil court (e.g. Article 1365 BW). In this case, plaintiff can prosecute compensation fully including both material and immaterial losses. Immaterial loss can be prosecuted as long as it pertains to the incidence of death (murder crime) or physical defect/ lesion in victim (Article 1370-1371 BW) but the weaknesses using civil trial process is that takes much time and cost.⁷

The Formulation of Compensation and Restitution Rights as Law Protection for Victim of Child Trafficking Crime

Giving compensation and restitution to victim of human trafficking is indeed not easy. Although several legislations governs compensation and restitution rights for the victim (law in text), but in its application in the field (*law in action*), there are some constraints encountered by law enforcers. It makes the victims of human trafficking crime getting compensation and restitution right difficultly.

Departing from the problems above, there are at least 4 (four) aspects becoming the constraints in giving and implementing compensation and restitution: *firstly*, the weakness of legislation. It can be seen from the polarization of legislations governing restitution giving to the victim of crime tending to be contradictory. For example, in the regulation of compensation and restitution in Law No.13 of 2006 about PSK (Witness and Victim Protection), delegated technically to Government Regulation Number 44 of 2008 about Giving Compensation, Restitution and Help to Witness and Victim. In some cases, this rule is in contradiction with Article 98 of KUHAP about case annexation, particularly related to procedural law to be used. It practically renders the law enforcers prefer using the provision of KUHAP as its rule of law is considered as more certain and applicative.

Secondly, regulations concerning compensation and restitution for the victim of crime are overlapping. There are at least three regulations governing the giving of restitution to witness and victim of crime: Government Regulation Number 44 of 2008 about Compensation, Restitution, and Help to Witness and Victim; Government Regulation Number 3 of 2002 about Compensation, Restitution, Rehabilitation for the victim of Severe Human Rights Infringement; and Law No. 21 of 2007 about PTPPO. Those three regulations basically govern the same aspect but different objects. Its implication in juridical formal manner instead inhibits the implementation of compensation and restitution and tends to result in new problems because there is no similar standard and procedure leading to sectoral ego.

Thirdly, in Law No.13 of 2006 about Witness and Victim Protection, restitution may include return of property, compensation giving for loss or sorrow, or reimbursement of cost for certain action. Meanwhile, in the Code of Criminal Procedure (KUHAP) the compensation focuses on only the real loss due to the crime. So in practice only material loss can be investigated by the judge. The demand for compensation for the loss suffered from by the victim is considered as immaterial, thereby should use civil law mechanism.

Fourthly, the compelling and executing powers of restitution implementation are weak. Law No.13 of 2006 about Witness and Victim Protection does not govern the compelling power to make payment and which institution authorized to execute the implementation of restitution. It means that if the perpetrators are not able and not willing to pay restitution to victim, it will have legal consequence and any implication to the perpetrators. It has practically broken the victim's right to get compensation.

Therefore, the legislation supervising and protecting the rights of victim weakly is a factor resulting in ineffective implementation of compensation and restitution. Actually many legal sources have

⁷ International Organization for Migration (IOM) in cooperation with Republic of Indonesia's Attorney and Police. Pedoman untuk Penyidikan dan Penuntutan Tindak Pidana Trafficking dan Perlindungan Terhadap Korban Selama Proses penegakan Hukum. International Organization for Migrations Mission In Indonesia and NZAID: Jakarta. 2005. p. 27.

governed the problem of compensation and restitution application and giving in KUHAP, Law No.13 of 2006 about Witness and Victim Protection, Law No.21 of 2007 about PTPPO, but it is still applied rarely and difficultly in several cases occurring.

To deal with the constraints with the fulfillment of compensation and restitution rights to the victim, there should be systemic approach to more optimal law enforcement, namely, through reforming structure, substance, and culture of law. It is in line with legal system suggested by Friedman in Khozim stating that law enforcement can run effectively when structure, substance, and culture of law have been studied in a unity and simultaneously.

Law enforcement itself is a part of entire life activity essentially constituting the interaction between various human behaviors representing different interests in the mutually approved frame of rule in a regulation prevailing, in either written or spoken forms. Mutual written rule included in a legislation product is intended to govern an order of living within society, nation, and state in order to be more disciplined and have law certainty.⁸

Consistent law enforcement is a part of law objective achieving attempt for living within society, nation, and state, the enforcement of justice and balanced law certainty, and the realization of orderliness.⁹ The implementation of law enforcement is not easy recalling other problems also affecting the law enforcement process itself, among others, related to substance, structure, and culture of law.

Conclusion

The attempt to be taken in giving law protection to child as the victim of human trafficking in legality principle has been governed in Republic of Indonesia's 1945 Constitution and national rules of law including laws and Presidential Regulation as well as House of Representative's Decree (TAP MPR) and international convention adapted into Indonesian positive law. The attempt to be taken to ensure law protection to child as the victim of human trafficking crime is reflected on 3 stages: when human trafficking crime occurs, in the process of trialing the perpetrator of human trafficking, and after the court's verdict over the perpetrator of human trafficking crime inferred from the provision of Law No.21 of 2007 about Eradication of Human Trafficking Crime and Law Number 35 of 2014 about the amendment to Law Number 23 of 2002 about Child Protection. The giving of compensation and restitution rights to the victim of human trafficking crime by both government through legislation and the victim's attempt through litigation and non-litigation methods in reality has not been consistent with the regulation developed.

Recommendation

Law enforcers should give the victim of human trafficking crime an understanding to demand their rights to get compensation and restitution as a form of law protection for the victim according to the existing legislation. In addition, law enforcers should impose punishment or sanction firmly to the perpetrators of human trafficking and otherwise facilitate the victim to demand their rights so that they will not encounter elaborate process in getting compensation and restitution.

⁸ Yulia Rena. (2010). *Viktimologi Perlindungan Hukum Terhadap Korban Kejahatan*. Yogyakarta: Graha Ilmu. p. 10.

⁹ Mulyadi Lilik. (2007). *Kapita Selekta Hukum Pidana Kriminologi dan Viktimologi*. Jakarta: Djambatan. p. 54.

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